

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CRAIG GAMBLE, et al.,

Plaintiffs,

vs.

BOYD GAMING CORPORATION, et al.,

Defendants.

Case No. 2:13-cv-01009-JCM-PAL

**ORDER**

(Countermotion to Strike - Dkt. #51)

The court conducted a hearing on March 27, 2014, on Plaintiffs' Countermotion to Strike Boyd's Affirmative Defenses to Plaintiffs' Firth [sic] through Third Claims for Relief (Dkt. #51) which the district judge referred to the undersigned for decision. The court has reviewed the Motion and Defendant's Opposition, and heard oral arguments of counsel at the hearing. Andrew Rempfer appeared on behalf of the Plaintiffs, and Karen Kubin appeared on behalf of the Defendants.

**BACKGROUND**

This is an action proceeding on a Master Second Amended Complaint (Dkt. #42) which consolidates three separate cases--this case and *Belmonte v. Boyd Gaming Corporation*, 2:13-cv-01043 and *Hernandez v. Boyd Gaming Corporation*, 2:13-cv-01801. The Master Second Amended Complaint (Dkt. #42) alleges claims for violations of the Fair Labor Standards Act ("FLSA") for Defendant's alleged unlawful compensation policies for forcing employees to work off the clock, improperly rounding down time and not paying overtime. The Plaintiffs seek relief on behalf of themselves and other similarly situated classes and sub-classes. The Master Second Amended Complaint ("MSAC") also asserts related claims on behalf of themselves and other similarly situated sub-classes for violations of Nevada's wage and hour laws, NRS § 608.010, *et. seq.*

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1 On November 20, 2013, the district judge entered an Order (Dkt. #41) approving the parties'  
2 Stipulation (Dkt. #39) to consolidate this case with *Belmonte v. Boyd Gaming Corporation*, 2:13-cv-  
3 01043-GMN, and *Hernandez v. Boyd Gaming Corporation*, 2:13-cv-1801-RCJ. The parties agreed all  
4 three cases should be consolidated into one action in the interest of judicial efficiency, and that  
5 Plaintiffs would file a MSAC in this consolidated action. Plaintiffs filed the MSAC (Dkt. #42)  
6 November 20, 2013. Defendant responded by filing a Motion to Dismiss Plaintiffs' Fourth and Fifth  
7 Claims for Failure to State a Claim (Dkt. #46) on December 9, 2013.

8 Plaintiff filed an opposition to the motion to dismiss and this Countermotion (Dkt. #51) on  
9 December 27, 2013. The countermotion argues that because Boyd failed to answer or otherwise seek  
10 an extension of time to file a responsive pleading to Plaintiff's First through Third claims for relief, its  
11 affirmative defenses, if any, "are consequently automatically stricken." Plaintiffs rely on *General Mills,*  
12 *Inc., v. Kraft Foods Global, Inc.*, 487 F.3d 1368, 1376 (Fed. Cir. 2007) to support their arguments that a  
13 motion to dismiss does not extend the time for filing an answer to an amended complaint where the  
14 time for responding to the original complaint has run. Plaintiffs filed a Second Master Amended  
15 Complaint, and therefore, Boyd had ten days from filing of the amended complaint in which to file a  
16 response. It did not file its motion to dismiss until December 9, 2013, and has therefore waived any  
17 affirmative defenses to Plaintiffs' first through third claims pursuant to Rule 12(a)(1)-(3)(A),  
18 12(a)(4)(A), and LR 7-2(d).

19 Defendant opposes the countermotion arguing that the *General Mills* case Plaintiffs rely upon is  
20 inapposite. In that case, the Federal Circuit held that the filing of a motion to dismiss did not extend the  
21 time for filing an answer to an amended complaint where the time for responding to the original  
22 complaint had already run. However, the weight of the authority in this circuit and elsewhere is that  
23 filing a partial motion to dismiss suspends the time to answer those claims or counterclaims not subject  
24 to the motion. The reasons for this rule are obvious and sensible because requiring a defendant to  
25 answer some claims concurrently with a pending motion to dismiss would result in unnecessary  
26 duplication and waste of time and resources for both parties and the court. Boyd timely moved to  
27 dismiss the state law claims asserted in Plaintiffs' MSAC.

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1 “akin to an amended complaint”, and stating that Plaintiffs consolidation of their claims into one  
2 document made it the “operative pleading.”)

3 The *Gamble* complaint was initially filed in state court and removed (Dkt. #1) on June 6, 2013.  
4 An Amended Complaint (Dkt. #4) was filed June 11, 2013. The parties stipulated to an extension of  
5 time for Defendants to respond, and Defendants timely filed an Answer to the Amended Complaint  
6 (Dkt. #13) on July 16, 2013. The answer asserted sixteen affirmative defenses, including those Plaintiff  
7 claims have been waived in this motion.

8 Because the SMAC is not an amended complaint, the tolling provision of Rule 12(a)(4) applies.  
9 That rule provides that unless the court orders otherwise, serving a motion under Rule 12 alters the time  
10 to file a responsive pleading. If the court denies the motion or postpones its disposition until trial, the  
11 responsive pleading must be served within fourteen days of notice of the court’s action. Here, Boyd D  
12 filed a motion to dismiss in response to Plaintiffs’ MSAC, and the motion to dismiss, if granted, is only  
13 partially dispositive.

14 The court agrees with the majority of courts interpreting Rule 12(a)(4) which have held that  
15 “filing a partial motion to dismiss will suspend the time to answer those claims or counterclaims that  
16 are not subject to the motion.” See *ThermoLife Intern., LLC v. Gaspari Nutrition, Inc.*, 2011 WL  
17 6296833 (D.Ariz.) (even when a pending motion to dismiss may only address some of the alleged  
18 claims, the motion to dismiss tolls the time to respond to all claims under Rule 12(a)(4)); see also  
19 *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 366 (E.D.N.Y.2009) (finding that requiring a party to  
20 reply to claims not the subject of a partial motion to dismiss would result in a “procedural thicket of  
21 piecemeal answers that would poorly serve judicial economy”); *Kent v. Green*, 2008 WL 150060  
22 (D.Colo.) (finding that partially dispositive Rule 12 motion altered responsive pleading date under Rule  
23 12(a)(4); *Beaulieu v. Board of Trustees of University of West Florida*, 2007 WL 2020161 (N.D.Fla.)  
24 (holding that a partial motion to dismiss “automatically extends” the time to file a responsive pleading  
25 on unchallenged claims pursuant to Rule 12(a)(4)); *Shah v. KIK Intern. LLC*, 2007 WL 1876449  
26 (N.D.Ind.) (holding that Rule 12(a)(4) applies “by operation of law” to claims not challenged in partial  
27 motion to dismiss); *Bertaut v. Parish of Jefferson*, 2002 WL 31528468 (E.D.La.) (“[e]ven the filing of a  
28 partial motion to dismiss extends the defendant's time to answer the entire complaint” under Rule

12(a)(4)); *Finnegan v. Univeristy of Rochester Medical Center*, 180 F.R.D. 247, 250 (W.D.N.Y.1998) (holding that the plain language of Rule 12(a)(4) contemplates suspending the time to response to the entire complaint, not just to claims that are the subject of a partial motion to dismiss); *Oil Express Nat'l, Inc. v. D'Alessandro*, 173 F.R.D. 219, 220 (N.D.Ill.1997) (“The majority of courts that have considered this question ... have concluded that a party does not need to file an answer while a partial motion to dismiss is pending”); *Brocksopp Engineering, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486–87 (E.D.Wis.1991) (holding that requiring an answer to unchallenged claims would result in duplicative sets of pleadings in the event the 12(b) motion is denied and cause confusion).

There is some authority for the Plaintiffs’ position that a defendant should answer the unchallenged portions of a complaint. In *Gerlach v. Michigan Bell Telephone Co.*, 448 F.Supp. 1168, 1174 (E.D.Mich.1978), the court acknowledged that the rule is silent and there was a dearth of case law on the subject at that time. The court held that “separate counts are, by definition, independent bases for a lawsuit and the parties are responsible to proceed with litigation on those counts which are not challenged by a motion under [Rule] 12(b).” However, this is an old, out of circuit case, and no other court has followed the *Gerlach* court's reasoning or ruling. In fact, every court to consider *Gerlach* on this point has disagreed with and declined to follow it. See *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F.Supp.2d 598, 638 (N.D. Iowa 2006) (citations omitted); see also *Pestube Systems, Inc. v. HomeTeam Pest Defense, LLC*, 2006 WL 1441014 (D.Ariz. May 24, 2006) (*Gerlach* “is clearly the minority position and the recent authority is clearly opposed to any such holding”); *Rosa v. California Bd. of Accountancy*, 2005 WL 1899515 (E.D.Cal.); *Batdorf v. Trans Union*, 2000 WL 635455 (N.D.Cal. May 8, 2000). This Court agrees with the majority of courts that have held that a timely filed motion to dismiss which addresses only some of the claims tolls the time to respond to the remaining claims under Rule 12(a)(4). This approach avoids multiple responses to the same pleading which conserves the resources of the court and the parties and simplifies the pleadings.

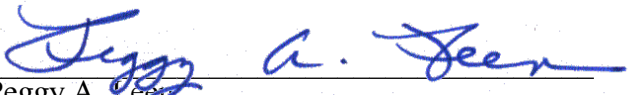
Having reviewed and considered the matter,

**IT IS ORDERED** that:

1. Plaintiffs’ Countermotion to Strike Boyd’s Affirmative Defenses (Dkt. #51) is **DENIED**.

2. Defendant shall have fourteen days from decision of the pending motion to dismiss in which to file an answer to Plaintiffs' MSAC, unless the district judge's order provides otherwise.

Dated this 31st day of March, 2014.

  
Peggy A. Leen  
United States Magistrate Judge